**GOVT 2306  
Texas and the States within the National Governing Landscape: Federalism  
Part Two: Federalism in the U.S. Constitution  
  
Introduction**

In this section we’ll look at some of the parts of the U.S. Constitution that carve out either powers for the states, or ways that they can influence the national government – notably Congress.

Let’s start with a quick review of relevant history. Federalism was the consequence of a compromise among the participants in the Constitutional Convention. It was not an intended, deliberate outcome of the Constitutional Convention. It exists because of the compromises necessary to get a majority to sign onto the Constitution in 1787. The government was already highly decentralized under the Articles of Confederation. State power had few limits, and no national institutions existed which could impose any limits at all.  
  
Whether this was a good or bad thing depended on ……  
  
This was a problem for business interests that wished to engage in commercial transactions between states.

This is was especially true of the group of people we would come to know as the Federalists.  
  
National objectives – those common to the states – were difficult to obtain.

Federalist required a stronger central government in order to ensure that certain policies they thought essential to the development of a commercial republic – like solid currency and internal and external security - would be implemented consistently across the nation.   
  
This is why they engineered the calling of the convention in the first place.

Leading Federalists Included  
  
Alexander Hamilton  
James Madison  
John Adams  
George Washington

But they were opposed by proponents of state power – people known for a period of time as the Anti-Federalists. They distrusted national power and saw it as a threat to the interests of the states, or more accurately their separate states. They distrusted each other as well.

Leading Anti Federalists included:   
  
Thomas Jefferson  
George Mason  
Elbridge Gerry  
Patrick Henry

Recall that state governments were older than the national government. They had colonial histories dating back a century and a half.  
  
People identified with the states primarily and the nation secondarily.

They didn’t want their self determination limited by either the nation, or by those in other states.  
  
They stood a lot to lose if a national government was established and reduced their autonomy.

But a stronger national government promised greater stability and potential prosperity.  
  
There’s the tradeoff.

The language of the [Declaration of Independence](http://www.archives.gov/exhibits/charters/declaration.html) treated states like separate nations.   
  
This is how the document concludes:

“We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”

The language uses the plural pronoun and mentions that all powers are granted to the states   
  
No mention is made of a national government. States were to cooperate voluntarily to achieve mutual objectives – which sounds nice.

But this arrangement made it difficult for the new nation to win the Revolutionary War and to establish a strong footing in its infancy.  
  
There was no entity in place that could compel the states to cooperate, or to fund the war and supply troops.

There was a similar problem with the Articles of Confederation.   
  
It was a document that enhanced the powers of the separate states, but had little that enforced cooperation.

This is a key point:   
  
Under the Articles of Confederation conflict between the states escalated. The states had the same basic powers as nations. One of the purposes of the expanded national powers under the Constitution was to restrict these conflicts.

Supporters of state power at the Constitutional Convention balked at efforts by James Madison and Alexander Hamilton to minimize state power in order to strengthen the ability of the national government to efficiently provide for the objectives of the Federalists.

For example, The Virginia Plan, which was written by James Madison and introduced by Edmund Randolph, would connect the national government squarely on the authority of the people, by passing the states completely.  
  
The US legislature was given the power to negate state laws.

This led to opposition, and eventually a compromise which provided the states a prominent role to play in the national government.   
  
It also led to the development of a specific institution - the Senate – which was designed in such a way as that it would be fully controlled by the state legislatures.

The Federalist and Anti-Federalist Papers

One of the arguments made by the Federalists to promote the ratification of the Constitution was that a strong national government could overcome dissension between the states.  
  
Anti Federalists – no surprise – disagreed and argued that the disagreements between the states did not pose a problem to the nation.

Alexander Hamilton, James Madison, and John Jay argued in favor of both advocated that point in the Federalist Papers. These were met by responses from a variety of Anti Federalists.  
  
If you feel ambitious, here are some of the papers that debated that point.

[**Federalist No. 6**](http://thomas.loc.gov/home/histdox/fed_06.html)**: Concerning Dangers from Dissensions Between the States**[**Anti Federalist No. 6**](http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/06.htm)**: The Hobgoblins of Anarchy And Dissensions Among The States**

[**Federalist No. 7**](http://thomas.loc.gov/home/histdox/fed_07.html)**: The Same Subject Continued: Concerning Dangers from Dissensions Between the States**[**Anti Federalist No. 7**](http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/07.htm)**: Adoption of The Constitution Will Lead to Civil War**

[**Federalist No. 8**](http://thomas.loc.gov/home/histdox/fed_08.html)**: The Consequences of Hostilities Between the States**[**Anti Federalist No. 8**](http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/08.htm)**: The Power Vested in Congress of Sending Troops For Suppressing Insurrections Will Always Enable Them to Stifle The First Struggles of Freedom**

[**Federalist No. 9**](http://thomas.loc.gov/home/histdox/fed_09.html)**: The Union as a Safeguard Against Domestic Faction and Insurrection**[**Anti Federalist No. 9**](http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/09.htm)**: A Consolidated Government Is a Tyranny**

The US Constitution is full of text which carves out powers the states continue to hold, and places where the states can continue to exert influence over the national government.   
  
It also defines the relationships between the states.

Let’s walk through these sections.

Article Four of the U.S. Constitution

Click here for a link to [Article Four of the Constitution](http://en.wikipedia.org/wiki/Article_Four_of_the_United_States_Constitution). [Click here](http://www.law.cornell.edu/constitution/articleiv) for another.

[Sections One](http://www.usconstitution.net/xconst_A4Sec1.html) and [Two](http://www.usconstitution.net/xconst_A4Sec2.html) outline the rights and obligations states have to each other.

[Article Four, Section One](http://press-pubs.uchicago.edu/founders/tocs/a4_1.html):   
  
Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

This is hugely controversial since it means that states must respect the contracts that others allow their citizens to enter into.   
  
Here’s a contemporary question: Does this mean states have to recognize gay marriages? The Supreme Court has yet to decide on this.

[Article Four, Section Two, Clause One](http://press-pubs.uchicago.edu/founders/tocs/a4_2_1.html):  
  
The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[Article Four, Section Two, Clause Two](http://press-pubs.uchicago.edu/founders/tocs/a4_2_2.html):   
  
A Person charged in any State with [Treason](http://www.usconstitution.net/glossary.html), Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having [Jurisdiction](http://www.usconstitution.net/glossary.html) of the Crime.

States cannot treat citizens from one state differently than how they treat their own.   
  
Any they cannot harbor criminal fleeing from other states.

[Article Four, Section Two, Clause Three](http://press-pubs.uchicago.edu/founders/tocs/a4_2_3.html):   
  
No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

The subject of the previous slide was made moot when the [13th Amendment](http://en.wikipedia.org/wiki/Thirteenth_Amendment_to_the_United_States_Constitution) was passed.

Sections [Three](http://www.usconstitution.net/xconst_A4Sec3.html) and [Four](http://www.usconstitution.net/xconst_A4Sec4.html) sections concerns the creation of new states.

[Article Four, Section Three, Clause One](http://press-pubs.uchicago.edu/founders/tocs/a4_3_1.html)  
  
New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the [Jurisdiction](http://www.usconstitution.net/glossary.html) of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[Article Four, Section Three, Clause Two](http://press-pubs.uchicago.edu/founders/tocs/a4_3_2.html)  
  
The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[Article Four, Section Four](http://press-pubs.uchicago.edu/founders/tocs/a4_4.html)  
  
The United States shall guarantee to every State in this Union a [Republican](http://www.usconstitution.net/glossary.html) Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

In summary these establish that new states shall be admitted, but that existing state borders are to be honored, the US shall have the ability to pass all types of laws in the territories, the states are guaranteed a republican form of government, and shall be protected both against invasion and domestic violence.

The Constitution also contains parts that allow the states some degree of influence over the actions of the national government.

We’ll look at these three:  
  
The Senate  
Elections  
Reserved Powers

Here’s a little detail on each

1 - The Great Compromise created the Senate, which was originally staffed (until the 17th Amendment) by people appointed by the state legislatures. They could then check the House of Representatives which was designed to directly represent the people of the nation by bypassing the states.

2 – The conduction of elections - as well as suffrage and the drawing of House districts - was granted fully to the states, though several subsequent amendments have restricted the criteria states can use to deny the right to vote. They still have full ability to conduct elections however.

3 – The 10th Amendment grants to states – and to the people – powers not specifically granted to the national government. These are called the reserved powers. Though there can be a great deal of controversy about what powers have been granted to the national government since different people can have different interpretations of the language granting those powers.

Here’s a bit more detail on each.

The Senate

While the United States House of Representatives was designed to reflect the will of the people, the Senate was designed to be more closely connected to the states.

The original Senate – as written in [Article One, Section Three](http://www.usconstitution.net/xconst_A1Sec3.html) – grants the legislature of each state the right to send two people to represent it in the Senate for six year terms.

It allowed equal representation to the states, not the people.

As opposed to the House, which represented states according to population and was composed of people chosen by the eligible electorate in the state, the Senate was composed of people sent to represent the interests of the state as defined by the legislature – not the people.  
  
This gave the states influence over what the national government did.

In a bicameral legislature, each chamber has veto power over the other.   
  
The states’ branch could negate what the peoples’ branch – the House of Representatives – passed into law.

The Senators were divided into [three classes](http://en.wikipedia.org/wiki/Classes_of_United_States_Senators) so that one third would face the voters every tow years.  
  
FYI: Texas’ Senators are in [class one](http://en.wikipedia.org/wiki/List_of_United_States_Senators_from_Texas) and [two](http://en.wikipedia.org/wiki/List_of_United_States_Senators_from_Texas).

This gave the institution additional insulation from the shifting preferences of the general public.

This system was in place until the [17th Amendment](http://caselaw.lp.findlaw.com/data/constitution/amendment17/) ([Wikipedia](http://en.wikipedia.org/wiki/Seventeenth_Amendment_to_the_United_States_Constitution)) was ratified in 1913 in the wake of concerns that the Senate was being dominated by corporate interests in each of the states. They were no longer representing the interest of the people, but of whichever corporation dominated a specific state.

Senators were accused of buying their elections in the state legislatures.  
  
State legislatures would deadlock on who they would send to the Senate, which meant that some states would go without representation for long periods of time.

But the change severely reduced the power of the state legislatures in the US Congress.   
  
It is argued that this allowed for the passage of New Deal policies – as well as others - that limited state power in the service of national goals.

This is a key point. States are weaker now than they once were in the national government due to this change.  
  
States are now just another interest group, whereas they once they were part of the governing system itself.

Recently there has been [a movement to repeal the 17th Amendment](http://www.npr.org/blogs/itsallpolitics/2014/02/05/271937304/rethinking-the-17th-amendment-an-old-idea-gets-fresh-opposition) and allow state legislatures the ability to appoint Senators once again.   
  
This is being promoted by business interests who see better opportunities to have their needs addressed on the state rather than the national level.

Elections

States have the ability to control elections to national office.  
  
This gives them indirect control of the House of Representatives and the Presidency – through the Electoral College.

While the House of Representatives is intended to allow the people of the U.S. to have a direct impact on the national government, the state governments are able to influence the composition of the House in its ability to conduct House elections.

As we will see in future lectures, the Texas Secretary of State is the chief election officer of Texas and each county’s County Clerk is it’s chief elections office.  
  
Here’s the relevant section in the U.S. Constitution.

In Texas, the [Secretary of State](http://www.sos.state.tx.us/elections/index.shtml) oversees the conducting of elections.   
  
The specific job of running them is given to each [county](https://gov.propertyinfo.com/tx-brazoria/Elections.asp). Each county has an elections department that carries out this function, but state and local actions can be overseen by the national government.

[Article 1, Section 4, Clause 1](http://press-pubs.uchicago.edu/founders/tocs/a1_4_1.html)   
  
The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

As with most other states, Texas adopted primary elections as ways for each party to select its candidates.   
  
The way that the primaries are conducted it fully up to the state. The rules for all of these elections is contained in the [Texas Election Code](http://www.statutes.legis.state.tx.us/).

National limits on the ability of states to drawn election laws anyway they wish was curtailed by the [Voting Rights Act of 1965](http://en.wikipedia.org/wiki/Voting_Rights_Act).  
  
Texas was one of a handful of states affected by this law since it had a history of racial discrimination in those laws.

The Voting Rights Act was itself based on the [Equal Protection Clause](http://en.wikipedia.org/wiki/Equal_Protection_Clause) of the 14th Amendment.  
  
So though the national government has no authority to pass laws directly related to elections, it can pass laws that indirectly affect them. These are laws that ensure that elections comply with equal protection.

The VRA outlawed discriminatory election and voting laws and targeted states like Texas that had a history of such laws.   
  
It has made all elections decisions – including the drawing of districts, subject to [pre-clearance](http://www.justice.gov/crt/about/vot/sec_5/about.php).

The assumption is – given history – that attempts will be made to continue to discriminate against minorities. Changes in the law have to be presented to the Justice Department, or the US District Court in DC who would review the law to determine if that was the case.   
  
If the change was denied, it had to be redone.

This was been a major source of conflict between the affected states and the national government. Texas has been a consistent critic of the law and has pushed back against it.  
  
The law would eventually be limited – and partially overturned - in the 2012 case of [Shelby County v. Holder](http://www.scotusblog.com/case-files/cases/shelby-county-v-holder/).

While pre-clearance was still allowed, the map used to determine which states and districts were subject to pre-clearance was argued to be dated and needed updating.  
  
As of this writing, it has not been updated.

Suffrage

Suffrage, of course, refers to the right to vote.   
  
Until the passage of the 15th Amendment, the national government gave the states total freedom to determine who they would allow to vote.

Here is an important point:   
  
The right to vote is not explicitly guaranteed in the Constitution.

This gave the states the ability to influence elections to the House of Representatives.

The US House of Representatives is designed in [Article 1, Section 2](http://www.usconstitution.net/xconst_A1Sec2.html) of the US Constitution, and it was created in order to allow the population of the United States that ability to directly influence the operations of the national government, by passing the states.

“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”

This allows the states to indirectly influence the activities of the US House of Representatives.

Control over suffrage was a principle way states could determine the nature of their delegations to the House of Representatives.   
  
Not all interests in the state would be able to influence them as long as suffrage was limited.

“Delegation” is the term often used to describe the group of people elected to represent the various districts in the state for each two year session of Congress.  
  
[Click here](http://en.wikipedia.org/wiki/United_States_Congressional_Delegations_from_Texas) for delegations from Texas dating back to 1845. [Click here](https://www.govtrack.us/congress/members/TX) for the current delegation from Texas.

The expansion of the suffrage.

Several amendments have been added that prevent the states from restricting suffrage for various reasons, such age race, gender and being 18, 19, or 20 years old. We will cover these in an upcoming section on suffrage.  
  
Other restrictions still exist, like mental incompetence and felony convictions. Click here for the [Texas Constitution’s Article 6. Suffrage](http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.6.htm).

A related conflict is the current controversy between Texas and the US is whether the Voter ID laws passed by the Texas Legislature in the 82nd Session is an attempt to [discriminate](http://www.chron.com/news/houston-texas/article/Feds-reject-Texas-voter-ID-3399575.php) against poor voters.

Are the laws attempting to curb fraud or manipulate the voter pool? Is this an issue that justifies national intervention?  
  
Often this pits politically powerful interests in the states against politically powerful interests on the national level.

Drawing Legislative Districts

The U.S. Constitution says nothing about districts in the US House.   
  
It only mentions that members of the House have to reside in the states they represent. Most states used districts to determine what their representatives would actually represent from the start. Note the section in red in the following slide:

[Article 1, Section 2, Clause 2](http://press-pubs.uchicago.edu/founders/tocs/a1_2_2.html)No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

It does not state that members of the House have to live in the districts they represent.  
  
Just that they have to live in the state they represent.

Over time all states have opted to divide themselves into House districts.

Instead of each member of the House representing states as a whole – what is also called at-large representation – each member has an assigned district. The number of districts is based on the number of members of the [apportioned](http://en.wikipedia.org/wiki/United_States_congressional_apportionment) to each state based on its population. A handful of states are small enough that they are only apportioned one representative.

Here’s the current apportionment of House members following the 2010 census

Here are the congressional districts drawn in Texas following the 2010 census.

As we will see in an upcoming lecture, the authority to draw these districts in Texas is given to the Texas Legislature, but often the plan is hammered out by the [Legislative Redistricting Board](http://www.tlc.state.tx.us/redist/process/LRB.html).   
  
We’ll have more to say about them later this semester. Suffice to say that questions are raised about whether having state legislatures draw legislative districts allows the dominant party in that state to draw districts in such a way to expand their power.

This is called [gerrymandering](http://en.wikipedia.org/wiki/Gerrymandering).  
  
Its argued that congressional districts have been drawn across the country so that they become safely Democrat or Republican. This creates incentives for candidates to adopt partisan positions on issues and leads to extremity, not moderation.

They’ll be more on this topic when we cover elections later in the semester.

The Reserved Powers

The US Constitution categorizes different types of powers and grants them to different levels of government.  
  
But the language used to mark these distinctions is vague and has been the subject of debate.

The terms commonly used to refer to these powers are:   
  
Delegated  
Implied  
Reserved  
Denied

Delegated Powers

The delegated powers are those that are specifically granted to the national government. They are sometimes also referred to as the numerated or expressed powers.

The term comes from the 10th Amendment – as does the related term the “reserved powers.”

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

They delegated powers are outlined in two parts of the Constitution.

1 - [Article One, Section Eight](http://www.usconstitution.net/xconst_A1Sec8.html) states what Congress can pass laws about, meaning what its powers are.  
  
2 - [Article Two, Section Two](http://www.usconstitution.net/xconst_A2Sec2.html) states what the President’s powers are.

Altogether they grant each branch power over commercial, security and foreign powers.

One of the more problematic aspects of the powers granted to the president is the [Commander-in-Chief Powers](http://www.law.cornell.edu/wex/commander_in_chief_powers). Presidents often claim that many powers are “[inherent](http://uchicagolaw.typepad.com/faculty/2005/12/the_presidents_.html)” within a broad understanding of this heading. There are no clearly defined limits to what these might be.

These can impact states.   
  
Example: President Eisenhower’s [use of federal troops](http://www.ourdocuments.gov/doc.php?flash=true&doc=89) to [enforce school desegregation](http://www.nytimes.com/learning/general/onthisday/big/0925.html) in Arkansas.

It can also include calling up the state militia to deal with a public emergency.

[Article Three, Section Two](http://www.usconstitution.net/xconst_A3Sec2.html) lists the powers of the judiciary, which primarily concern what types of disputes it can hear in its courts.  
  
After ratification, the states pushed back against one of the types of disputes the national courts could hear.

The original Constitution stated that the national courts could hear cases “[between a State and Citizens of another State](http://caselaw.lp.findlaw.com/data/constitution/article03/17.html).”  
  
This meant that if you wanted to sue a state, you could do so in the federal courts.

But states claimed this violated their right of [state sovereign immunity](http://en.wikipedia.org/wiki/Sovereign_immunity_in_the_United_States). They can only be sued if they allow it, they cannot be forced to answer a lawsuit in a different court.   
  
The original Constitution, however, did force them to.

This power was affirmed in [Chisholm v. Georgia](http://en.wikipedia.org/wiki/Chisholm_v._Georgia), which allowed a lawsuit against Georgia initiated by a citizen of South Carolina to go forward. The states responded by ratifying the [Eleventh Amendment](http://en.wikipedia.org/wiki/Eleventh_Amendment_to_the_United_States_Constitution) that overturned the decision.

States are still subject to lawsuits under the [Fourteenth Amendment](http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution) under [privileges or immunities](http://en.wikipedia.org/wiki/Privileges_or_Immunities_Clause) and [equal protection clauses](http://en.wikipedia.org/wiki/Equal_Protection_Clause).  
  
As with the 17th Amendment discussed above, this granted additional power to the national government.

The conflict over the extent of state sovereign immunity from lawsuits authorized in the US Constitution is ongoing. The Supreme Court regularly rules on such cases.

The principle power that the US Judiciary has over states is not stated anywhere in the Constitution. It is the power of judicial review. While the application of judicial review was controversial when applied to laws passed by the national government it was never controversial as far as state laws go. The Supremacy Clause was taken to imply that the national government could overturn state laws judges to violate the US Constitution. It did not establish a process for doing so however.

Controversy:   
  
The fact that the national government is granted “delegated” powers which are defined in the Constitution suggests that they might be limited. James Madison says as much in [Federalist #45](http://constitution.org/fed/federa45.htm).

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

What this means is that any law or action of the national government has to be based on language in the Constitution that authorizes that action.   
  
Whether it has done so is up to the judiciary, and ultimately to the Supreme Court.

The courts are often used as venues for challenging the constitutionality of various laws, both state and national.  
  
Texas has a history of taking legal action against the national government.

States are different.   
  
Since their powers are “numerous and undefined” they do not need authorization under the US Constitution to do something – unless the US Constitution forbids the activity, or establishes that they need congressional authorization.

Put it this way. While the constitutionality of “Obamacare” can be challenged because it does not clearly fit under the commerce clause, the constitutionality of “Romneycare” cannot since it fits under the reserved powers.

The Denied Powers

Closely related to the Delegated Powers are the Denied Powers.   
  
Two sections in Article One deny powers to the national government ([Section 9](http://www.usconstitution.net/xconst_A1Sec9.html)) and the states ([Section 10](http://www.usconstitution.net/xconst_A1Sec10.html)). The Bill of Rights and the Fourteenth Amendment also deny powers as well.

Article One, Section 10 limits states from powers that are national in character, or anything that might interfere with international relations.  
  
- entering into treaties  
- coining money  
- tax imports or exports  
- have a standing army  
- engage in war

This is intended to explicitly state – contrary to the Declaration of Independence – that states are not nations and do not have national powers.

Implied Powers

These are powers the national government claims by virtue of several clauses that have an elastic quality to them. There are three:   
  
Commerce  
Necessary and Proper  
Taxing and Spending for the General Welfare

Each is the subject of ongoing conflict between the national and state governments that involves debate over how constitutional text is to be interpreted.  
  
Many of the disputes between the Texas and the US governments concern these clauses.

A quick word on each

[The Commerce Clause](http://www.law.cornell.edu/wex/commerce_clause): Congress has the power to *“to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”*

States commonly interfered with the commerce of other states under the Articles of Confederacy. Trade wars almost broke out a few times. The Annapolis Convention was specifically called in order to address those concerns – but failed to reach a quorum. Thus the Convention.  
  
National control over commerce was one of the goals of the Federalists and a key purpose of the convention.

But there is huge debate – now and over American history – about what “commerce” means.

Does it simply refer to trade, or does it also allow for regulations that are indirectly related to it?   
  
Can it allow for prosecution of price fixing? The breaking apart of monopolies?

This applies to criminal justice also. Crime is not mentioned in the US Constitution, so what authorizes the existence of the FBI and other agencies?   
  
Criminal activity is often commercial in nature – or it impacts the commercial process. If it does do over state lines, the national government argues this fits constitutional language.

During the New Deal, the Supreme Court expanded the interpretation of commerce to allow for the regulation of manufacturing and labor, activities that were part of the commercial process. Other rulings also expanded national regulatory power.

Since then there has been a push back against the use of the Commerce Clause to facilitate expansions of national power.   
  
Texas has been part of this effort.

Some of these controversies involve civil rights policies.   
  
The Civil Rights Act is based on the commerce clause since it applies to public accommodation which serve individuals who may be involved in interstate travel.

[Necessary and Proper Clause](http://law.onecle.com/constitution/article-1/49-necessary-and-proper-clause.html): Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof".

As with “commerce” there has been a dispute over what “necessary and proper” means.   
  
Does it mean “useful” or “essential?” The former provides for broad powers, while the latter constricts them.

The early struggle between Maryland and the US over the constitutionality of a chartered US bank centered on the terms meaning. John Marshall argued that the bank was a legitimate exercise of national power, but later Andrew Jackson – when he vetoed and extension of the charter – would disagree.   
  
See [McCullough v Maryland](http://en.wikipedia.org/wiki/McCulloch_v._Maryland).

Maryland, and others, thought the US government was limiting the ability of the states to control banking within its borders. And this was true. But the court ultimately argued that this interfered with the constitutional authority granted to the national government to regulate national commerce.

Finally:

“The Congress shall have Power To lay and collect Taxes, Duties, [Imposts](http://www.usconstitution.net/glossary.html) and [Excises](http://www.usconstitution.net/glossary.html), to pay the Debts and provide for the common [Defence](http://www.usconstitution.net/constmiss.html) and general [Welfare](http://www.usconstitution.net/glossary.html) of the United States . . .”

This part can be a bit confusing since it is referred to in several ways:  
  
[Taxing and Spending Clause](http://en.wikipedia.org/wiki/Taxing_and_Spending_Clause)  
[General Welfare Clause](http://en.wikipedia.org/wiki/Taxing_and_Spending_Clause)

The power to tax and spend is tied into efforts to promote the common interests of the states.   
  
“the *general* welfare and the *common* defense”

One controversy here concerns the meaning of “general welfare.” Does it refer to how the powers granted in the Constitution are to be conferred (not for specific private interests), or does it grant broad authority to pass laws on any subject Congress deems oriented toward the general welfare.

A fierce struggle over the meaning of this clause occurred in the early years of the republic. The Federalists argued for a broad interpretation of it, the Democrat Republicans argued for a limited interpretation.

Prior to the New Deal, the Supreme Court tended to take a narrow view of the clause and overturned legislation that attempted to punish various practices – such as child labor – by imposing taxes on products made by children.  
  
See: [Bailey v. Drexel Furniture Co.](http://en.wikipedia.org/wiki/Bailey_v._Drexel_Furniture_Co.)

The court would reverse itself soon enough, most notably in [Helvering v. Davis](http://en.wikipedia.org/wiki/Helvering_v._Davis), which stated that Congress had the authority to create a unique tax in order to spend money on Social Security.  
  
This established the constitutionality of the Social Security Act.

The controversy persists.   
  
Current efforts to roll back the size and scope of the national government at least partially focus on efforts to limit what is meant by the phrase “general welfare.”

An additional controversy exists over whether the national government’s spending power can be used to ensure common standards and policies across the states.

For some interesting reading in that direction you might want to look at the following comment on [Ron Paul and the General Welfare Clause](http://www.cato-at-liberty.org/ron-paul-on-the-general-welfare-clause/),

In addition to funding programs that provide for the general welfare, taxes can also be used as mechanisms for ensuring certain standards are maintained across the states.

One example was the successful effort to get all states to raise their legal drinking age to 21. The [National Minimum Drinking Age Act](http://en.wikipedia.org/wiki/National_Minimum_Drinking_Age_Act) attempted to compel states to increase their drinking ages by threatening to a decrease in highway funding.

[South Dakota challenged](http://en.wikipedia.org/wiki/South_Dakota_v._Dole) the law, but a 7-2 majority on the Supreme Court ruled that the Taxing and Spending Clause allowed Congress to exert pressure on the states to comply with a national standard.

This controversy continues to heat up as the court has grown more suspicious of national power.   
  
A current dispute concerns whether the US can entice the states to broaden Medicaid coverage. [Click here](http://www.nejm.org/doi/full/10.1056/NEJMp1113416) for one view, and [here for another](http://balkin.blogspot.com/2012/04/coercion-compulsion-and-aca.html).

Again, these are all different types of implied powers that are argued (not conclusively) to be justified by the elastic clauses. Disputes continually arise based on how elastic one believes these clauses to in fact be.

Reserved Powers

The term “reserved powers” comes from the [10th Amendment](http://www.law.cornell.edu/anncon/html/amdt10toc_user.html).

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The reserved powers are taken to refer specifically to the [police powers](http://en.wikipedia.org/wiki/Police_power), these are powers to regulate the health, safety, morals and welfare of a community.

These powers have an open ended quality to them.  
  
Recall the “numerous and undefined” nature of state power. The scope of the expressed powers is vast. Many of these are delegated to local governments to implement.

The bulk of what the state of Texas does – the specific nature of its activities – is based on the reserved powers carved out in the Constitution.   
  
But this area presents controversies.

What degree of overlap between national and state powers is allowable?  
  
Is the line clean and clear, or is there a gray area? This became less and less easy to define as commerce and related matters like crime became easy to take across state borders.

States habitually complain that the national government aggressively uses the commerce clause to justify expanding the extent of its regulatory powers, at the expense of its ability to regulate business within its own borders which is established for the states in the 10th Amendment.

The [Concurrent Powers](http://en.wikipedia.org/wiki/Concurrent_powers)

This refers to the types of powers that exist on all levels of governments.  
  
The most obvious is the power of taxation. Other powers include the creation of courts, the building of roads and other things.

If you have the time (and of course you do) [here is an exhaustive exposition of the concurrent powers](http://www.claremont.org/repository/doclib/Encyclopedia%20Amer%20Const%20Arts.pdf) from Leonard Levy.

A final complicating factor:  
  
[The 14th Amendment](http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution)

We spent a substantive amount of time discussing the 14th Amendment in GOVT 2305, so need to go too far with it here, except to repeat a key point:   
  
The purpose of the amendment was to place two key limits on the power of the states – especially the states that were part of the Southern Confederacy, which included Texas.

Here’s the opening section:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first thing this does is force states to accept the citizenship – meaning the legal status – of people born in the U.S.  
  
This was intended to guarantee the full rights – and legal status – of the recently freed slaves.

They had privileges and immunities guaranteed by the national government, and the states could not deny them.   
  
This meant that whatever rights are guaranteed by the national government had to be accepted by the state government.

The second thing was that states had to treat “any person within its jurisdiction” equally.   
  
As we will see as we cover current events, this continues to be controversial. Texas tends to have a more limited understanding of the applicability of this part of the amendment. It commonly sues the national government over it.

Note this terminology in Section 5 of the amendment: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

This would provide constitutional authorization for laws like the Civil Rights Act of 1964 and the Voting Rights Act of 1965, among many others.

We will touch on these controversies in future sections.

Next Section:   
  
A quick look at the eras of federalism, with a special emphasis on how each era impacts state power.